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Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

IVAN ANDRICK AND HELEN ANDRICK,
Petitioner,
v.
POOL ENERGY SERVICES CO., ET AL,
Respondents.

On Petition for Writ of Certiorari to the
United State Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether summary judgment and judgment on the pleading for the employer are appropriate in an age discrimination case brought under the ADEA in which the discharged employee has proven a *prima facie* case, and has demonstrated evidence that the only business justification for the discharge proffered by the employer is false and pretextual, and that the discharge was motivated by age discrimination.

2. Whether the exception to the employment at will doctrine in Texas prohibiting discharge of an employee for refusal to engage in illegal conduct extends to a case in which an employee is *constructively* discharged for refusal to engage in a criminal conspiracy.

LIST OF ALL PARTIES

PETITIONERS:

IVAN ANDRICK
HELEN ANDRICK

RESPONDENTS:

POOL ENERGY SERVICES CO.
RON G. HALE

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BASIS FOR JURISDICTION

1. The judgment sought to be reviewed hereby was entered on January 18, 1996.

2. An order denying a petition for rehearing was entered on February 22, 1996.

3. Jurisdiction is conferred on the Court by 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Age Discrimination in Employment Act of 1967 29 U.S.C. §§621 et. seq. (Attached in the appendix is a complete copy of the statute).

STATEMENT OF THE CASE

This case is based on two instances of wrongful termination of Ivan Andrick. For over 31 years, Ivan Andrick worked in various capacities for Defendant Pool Energy Services Company (Pool Company) in oil drilling and related activities all over the world. He was always a good, loyal and productive employee. (Ron Hale deposition, R 1309-1310; Andrick deposition, R 1336-1337; Andrick

employment record, R 1359). When Andrick was fired, he was 63 years old, probably the oldest employee of Pool Company, with the longest service (Andrick Affidavit, R 1361-1365; Andrick employment record R 1359; Ron Hale deposition, R 1312-1313). Andrick was general manager, in charge of an oil drilling operation in Oman. Although countless overseas jobs Andrick worked on were completed or terminated or suspended for various reasons, his employment had always continued without interruption; the end of one job was always, without exception, followed by a transfer to another job. (Andrick deposition, R 1334, 1336; Andrick employment record, R 1359; Ron Hale deposition, R 1307-1308). In fact, to Andrick's knowledge no Pool Company manager had ever been fired because a job was lost, as long as the manager had been performing his duties properly. (Andrick Affidavit, R 1361-1365). After the Oman job, which Andrick was managing, was lost by Pool Company, Andrick was told by his boss, Ron Hale, executive vice president of Pool Company, that he was being considered for transfer to Tunisia, Italy, Ecuador, and the U.S. (Hale deposition, R 1307-1308; Andrick deposition, R 1338-1339). Job openings were available in most of those locations, as well as in Malaysia and Alaska, which Hale concealed from Andrick. (Andrick deposition R 1331; Andrick Affidavit, R 1361-1365).

Pool convinced Andrick to select and train his 36 year old assistant to be his replacement, telling him that they were looking for his next position, while in fact they were busy concocting a fraudulent complex scheme of shuffling general managers to avoid transferring Andrick to one of the available slots. After Andrick had completed training his replacement to look after the Pool Company investment in

Oman, he was fired, and younger men were placed in available general manager jobs in Malaysia, Italy, Ecuador, and Alaska.

Ivan Andrick was terminated by Pool on March 31, 1993. (Ivan Andrick employment record, R 1359). On April 16, 1993, Steve Orso, age 58, the general manager of the Malaysia job, was sent to Ecuador to fill a vacant general manager position. (Deposition of Hale, R 1304-1305; Steve Orso employment record, R 1358). Kerry Kunz, age 34, remained in Malaysia as operations manager and overall manager in Malaysia. The general manager's position in Malaysia was temporarily left vacant. (Hale deposition, R 1305). Steve Carlson, age 43, who was under suspicion for using company money for personal purposes (Ron Hale deposition, R 1301-1303), was transferred from Italy where he was general manager, to Malaysia, as operations manager, to replace Kerry R. Kunz. (Andrick deposition, R 1331-1332; Andrick Affidavit, R 1361-1365; Steve Carlson employment record, R 1356). Kunz, who was at that time 34 years old, was then promoted to the position of general manager in Malaysia, which has been left vacant since Orso had been transferred to Ecuador. (Ron Hale deposition, R 1305; Kunz employment record, R 1357). In May, 1993, the vacant position of general manager in Alaska was filled by Dale Larson, a new hire, who was less than 50 years of age. (Ivan Andrick deposition, R 1353-1355; Andrick Affidavit, R 13651-1365).

Ivan Andrick was indisputably qualified for the jobs of general manager in Malaysia, Italy, Ecuador and Alaska (Andrick Affidavit, R 1361-1365). Instead of placing him in one of those jobs, Ivan Andrick was fired. A 36 year old

man replaced him, a 34 year old man was promoted to general manager in Malaysia, younger men were sent to fill the general managers' positions in Tunisia, Ecuador, and Italy, and a younger man was hired from outside to fill the general manager's job in Alaska. The scheme was sophisticated, as is to be expected from someone with Hale's experience: he was formerly a personnel man, and at one time was even equal opportunity coordinator for Pool (Ron Hale deposition, R 1316). When the music stopped in this game of musical chairs, everyone had a seat except Andrick.

Recently, Frank Schirmacher, who was Andrick's direct supervisor after Ivan Andrick was re-employed by Pool in Tunisia, disclosed to Andrick that at the request of Pool Company he had signed a written document stating that there had been no position available in Tunisia or Italy for Ivan Andrick when the job was lost in Oman in 1993. Andrick confronted Schirmacher, who then admitted that, if Hale had requested him to find a manager's position for Andrick in Tunisia or Italy at that time, he could and would have done so. (Andrick Affidavit, R 1361-1365).

After this suit was filed, Andrick was offered and accepted re-employment by Pool as general manager in Tunisia beginning October 5, 1994. Andrick accepted the offer in good faith, but discovered within 30 days after arriving in Tunisia that he had walked into a trap. Ron Hale and other high Pool Company officials had much earlier designed and carried out a scheme to defraud the Tunisian government out of taxes by understating the compensation of expatriate employees subject to Tunisian taxes. Because this scheme originated and was directed from the U.S., it was a violation of U.S. as well as Tunisian law. Andrick was

continually pressured by Frank Schirmacher to participate in the continuation of the criminal conspiracy. Andrick refused to participate in the scheme. Also, as general manager in charge of the job in Tunisia, Andrick would be held responsible if and when the Tunisian government discovered the scheme, whether he had participated or not, and would most likely be incarcerated until the matter was cleared up. If that happened, Andrick knew that he could not count on Hale or Pool to help him. After increasing pressure was placed on him to sign and submit false reporting forms to the Tunisian government, while others continued to expose him to danger by perpetrating the criminal conspiracy on orders from headquarters in the U.S., Andrick reluctantly resigned. (Andrick affidavit, R 1361-1365).

BASIS FOR JURISDICTION IN THE COURT OF FIRST INSTANCE

The basis for jurisdiction of this case in the court of first instance, the U.S. District Court for the Southern District of Texas, is 28 U.S.C. § 1331.

ARGUMENT

First Point

SUMMARY JUDGMENT FOR THE EMPLOYER IN AN AGE DISCRIMINATION CASE IS NOT APPROPRIATE WHEN THE DISCHARGED EMPLOYEE HAS PROVEN A *PRIMA FACIE* CASE, AND HAS PRODUCED EVIDENCE DEMONSTRATING THAT THE ONLY REASON PROFFERED BY THE EMPLOYER FOR THE

DISCHARGE IS FALSE AND PRETEXTUAL, AND THAT THE DISCHARGE WAS MOTIVATED BY AGE DISCRIMINATION

In a summary judgment case, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The same standard applies for judgment on the pleading. A motion for judgment on the pleading, like a motion for summary judgment, should be granted only if there is no issue of material fact, and if the pleading show that the moving party is entitled to prevail as a matter of law. Moreover, when construing a motion for judgment on the pleading, the Court is required to assume that the allegations of fact presented by the opposing party are true, and must further view the facts presented in the pleading and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. *See Herbert Abstract Co. v. Touchstone Properties, Ltd.*, 914 F.2d 74, 77 (5th Cir. 1990); *Greenberg v. General Mills Fun Group, Inc.*, 478 F.2d 254, 256 (5th Cir. 1973). Andrick established a *prima facie* case of age discrimination by offering undisputed evidence that he was between the ages of 40 and 65, that he was qualified for the job of general manager of a Pool job, that he was discharged from the job of general manager of the job in Oman, and that shortly after he was fired at least four available general manager jobs in other locations were filled by Pool with younger men. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

A presumption is hereby created of unlawful discrimination by Pool. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

That presumption gives Pool the burden of producing evidence that the discharge was for a legitimate, non-discriminatory reason. *Id.* The reason given by Pool for firing Andrick was that there were no general manager jobs available in the Pool system to which Andrick could have been posted. At that point the *prima facie* case was rebutted, and the presumption disappeared. *Id.* at 255. Andrick then had the burden to demonstrate that the reason given by Pool was false, and that he was the victim of unlawful discrimination. *Id.* at 256. Andrick met that burden. He proved that there *were* other general manager jobs which were vacant at or shortly after the time Andrick was fired for which Andrick was qualified and which Pool staffed with younger men instead of Andrick. According to *O'Connor v. Consolidated Coin Caterers Corporation*, 116 S.Ct.1307 (1996), the fact that all of the men placed in the available general manager's jobs in front of Andrick were younger than Andrick is evidence of age discrimination even though some were over 40. Andrick additionally submitted evidence that his supervisor admitted that he could and would have found a job for Andrick had he been asked to do so, thereby again discrediting Pool's claim that after a diligent search and effort, no available general manager jobs were to be found.

Justice Scalia discussed this final burden of the plaintiff in *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993):

> The factfinder's disbelief of the reasons put forward by the defendant, (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination....*Id.* at 2749.

In reviewing the evidence and the inferences to be drawn therefrom under the *Anderson* standard; *i.e.*, in the light most favorable to Andrick, the non-moving party in the summary judgment process, the District Court should have found sufficient evidence to infer that Pool intentionally discriminated against Andrick. Instead, it chose to believe the only reason proffered by Pool, and ignored the evidence favorable to Andrick.

Hicks was not a summary judgment case, or a case on judgment on the pleading. In *Hicks*, Justice Scalia repeatedly referred to *the trier of fact* or to *the factfinder* as the one to determine the credibility or sufficiency of evidence as regards the truth or falsity of the business justification given by the employer as well as the issue of discrimination. The District Court usurped the role of the jury in this case.

Hicks has been cited in a multitude of cases, many of which disagree on how it is be applied. There is a conflict in the Courts of Appeals on the issue of the role of the District Court in determining whether the employee has presented sufficient evidence in rebuttal of the employer's proffered business justification to present the case to a jury.

The Tenth, Ninth, Eighth, and Seventh Circuits correctly interpret *Hicks* by holding that once an employee has offered evidence that the justification offered by the employer for the discharge is false, a summary judgment is inappropriate and the case goes to the factfinder. See, e.g., *Randle v. Aurora,* 69 F.3d 441 (10th Cir. 1995); *Courtney v. Biosound, Inc.*, 42 F.3d 414 (7th Cir. 1994); *Kobrin v. University of Minnesota*, 34 F.3d 698 (8th Cir. 1994); *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993).

The Tenth Circuit clearly follows *Hicks* in *Randle v. Aurora,* 69 F.3d 441, 443 (10th Cir. 1995), where it held that:

> If the plaintiff establishes a prima facie case and shows either that the defendant's facially nondiscriminatory reasons are pretextual or otherwise introduces direct evidence of illegal discriminatory motive, the case then moves to trial, where the presumption of discrimination created by the prima facie showing "simply drops out of the picture." (citing *Hicks*). At trial, the plaintiff must prove illegal discrimination either (inferentially by showing that the proffered reason is a pretext for discrimination; and/or (2) directly by offering direct evidence of discrimination. *Id.* at 453 (citations omitted).

That court further held:

> ...at the summary judgment stage, [the employee] can establish a sufficient possible inference of discriminatory intent by demonstrating that there is a genuine dispute as to whether the reasons offered for

> the challenged employment decision were pretextual--e.g. that they were not the true motivating reasons defendant professed them to be. *Id.* at 455.

The Ninth Circuit follows a similar interpretation of *Hicks*. *See Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993), where the court cites *Hicks* in holding summary judgment inappropriate because "[t]here will always be a question for the factfinder once a plaintiff establishes a *prima facie* case and raises a genuine issue as to whether the employer's explanation for its action is true." *Id.* at 1433.

The Eighth Circuit also has followed *Hicks* in holding that an employee "...may overcome summary judgment by producing evidence that, if believed, would allow 'a reasonable jury to reject the defendant's proffered reasons for its actions.'" (citation omitted). *Kobrin v. University of Minnesota*, 34 F.3d 698, 703 (8th Cir. 1994).

In the Seventh Circuit, the court demonstrates a very clear understanding of the *Hicks* holding in *Anderson v. Baxter Healthcare Corp.*,13 F.3d 1120 (7th Cir.1994):

> Both *McDonnell Douglas* and *Hicks* speak to the burden the plaintiff bears at trial. However, the non-moving party, in this case the plaintiff, has a lesser burden. He must only "produce evidence from which a rational factfinder could infer that the company lied" about its proffered reasons for his dismissal. *Id.* at 1124.

In the same case, the Seventh Circuit suggested a solution to the confusion surrounding the *Hicks* ruling:

> In our view, the holding in *Hicks* is that a plaintiff is not entitled to judgment as a matter of law simply because she proves her prima facie case and shows that the employer's proffered reasons for her discharge are false. The next logical question is whether the plaintiff may prevail, not automatically as a matter of law, but through submission of her case to the ultimate factfinder, under such circumstances. *Hicks* answers this question in the affirmative. The Court explicitly states that the plaintiff *may* prevail in a discrimination case by establishing a prima facie case and by showing that the employer's proffered non-discriminatory reasons for her demotion or discharge are factually false. (citing *Hicks)* This "will permit the trier of fact to infer the ultimate fact of intentional discrimination." *Id.* at 1123-24.
>
> As the dissent in *Hicks* points out, there is language in the Court's opinion that could support a finding that additional evidence of discrimination besides establishment of a prima facie case and rejection of the employer's proffered reasons for the plaintiff's discharge is required to prove intentional discrimination. However, such language is dicta. In rejecting application of this language, we are mindful of the Supreme Court's admonishment that it is "generally undesirable, where holdings of the Court are not at issue to dissect the sentences of the United States Reports as though they were the United States Code." (citing *Hicks*) *Id.* at 1124, n.3.

In stark contrast to the Tenth, Ninth, Eighth, and Seventh Circuits, the First Circuit holds in *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994) that:

> In the context of a summary judgment proceeding, *Hicks* requires that, once the employer has advanced a legitimate, nondiscriminatory basis for its adverse employment decision, the plaintiff, before becoming entitled to bring the case before the trier of fact, must show evidence sufficient for the factfinder reasonably to conclude that the employer's decision to discharge him or her was wrongfully based on age....Thus, the plaintiff cannot avert summary judgment if the record is devoid of adequate direct or circumstantial evidence of discriminatory animus on the part of the employer.

The law in the Fifth Circuit appears to be akin to that in the First Circuit, as most recently stated in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996):

> Thus, a jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains. The employer, of course, will be entitled to summary judgment if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory. *Id.* at 993.

An inference of discrimination may be found if the employer's proffered reasons are shown to be false, but only if the court determines this is demonstrated through substantial evidence." *Id.* The Fifth Circuit and the First Circuit have erroneously interpreted *Hicks* to hold that the trial court should usurp the jury's role as the "trier of fact" or as the "factfinder" in the summary judgment stage. In practice, that interpretation can deprive an employee, as it did in this case, of his right to trial by jury on critical fact issues. The District Court concluded that: "In sum, the company simply did not have an available position for Andrick and his (sic) Court will not second guess the business decisions of the defendants." (Order of the District Court p. 5). In fact, what the District Court did was totally disregard the evidence proffered by Andrick that there *were* available positions which Pool filled with younger men in an unnecessary internal shuffling of general managers. The court also ignored the admission of Andrick's supervisor that he could and would have found a job for Andrick had he been asked to do so. Andrick had been told by Hale that Hale had inquired and that no jobs were available for Andrick in the entire Pool system.

This case is a perfect example of how the misinterpretation of *Hicks* in the First and Fifth Circuits can result in a grave injustice. Ivan Andrick is entitled to a determination of the factual issues in this case by a jury.

Second Point

THE COURT ERRED IN HOLDING THAT IVAN ANDRICK WAS NOT WRONGFULLY CONSTRUCTIVELY DISCHARGED UNDER

THE *SABINE PILOT* EXCEPTION TO THE EMPLOYMENT AT WILL DOCTRINE WHEN HE RESIGNED RATHER THAN OBEY HIS EMPLOYER'S REPEATED ORDERS TO VIOLATE TUNISIAN LAW AND RISK PRISON.

In 1985, the Texas Supreme Court, in *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985), recognized for the first time as a public policy exception to the employment at will doctrine, a cause of action for wrongful discharge based on the termination of an employee for refusal to perform an illegal act. The court below held that the *Sabine Pilot* cause of action does not protect Ivan Andrick because he quit rather than continue to endure the pressure of (1) the repeated demands by Pool to engage in Pool's long-established and continuing criminal conspiracy to evade Tunisian taxes, and (2) the danger that the criminal conspiracy would be uncovered by the Tunisian authorities, and he would be incarcerated.

Andrick believed that he would eventually be fired for refusing Pool's demands to sign fraudulent expatriate personnel reporting documentation, and, as the head of the Pool Tunisian operation, would be held responsible by Tunisian authorities if the Pool criminal conspiracy were to be discovered, whether he had personally participated in the criminal conspiracy or not. (R 1361-1365).

The hopelessness of Andrick's predicament with his employer was recognized and analyzed in the case of *Higgenbotham v. Allwaste*, 889 S.W. 2d 411 (Tex. App. -- Houston [14th Dist.] 1994, writ denied), where the court acknowledged the impossibility of an employee remaining on

the job in the face of repeated employer demands to engage in illegal conduct. The opinion clearly depicts Andrick's dilemma as regards his employer: if he complied with the Pool demand he would be participating in a continuing course of illegal conduct which is morally, ethically, and legally wrong, and which would subject him to severe penalties and probably imprisonment under both Tunisian and U.S. law. If he refused to comply with the Pool demands to perform the illegal acts he would almost certainly be fired for insubordination. Of course, Ivan Andrick's position was even more desperate, because with the passage of time the possibility increased that the illegal scheme would be uncovered by the Tunisian government and Ivan Andrick held responsible as the Pool manager whether he personally participated in criminal conduct or not. (R1361-1365)

While acknowledging that the *Sabine Pilot* exception to the employment at will doctrine has been narrowed by the Texas Supreme Court in *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723 (Tex. 1990), the court in *Higgenbotham* said:

> The parameters for a claim of wrongful termination for refusing to engage in illegal conduct are delineated by the Texas Supreme Court's decision in *Sabine Pilot Service, Inc. v. Hauck* 687 S.W.2d 733 (Tex. 1985) and *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723 (Tex. 1990). These cases carve out an exception to the long standing rule in

Texas that employment for an indefinite term may be terminated at will and without cause. *Winters*, 795 S.W.2d at 724. This is often referred to as the "employment-at-will" doctrine. In *Sabine Pilot*, the Court acknowledged a narrow exception to this doctrine for employees discharged for the sole reason they refused to perform an illegal act, *Sabine Pilot*, 687 S.W.2d 735. *Winters* subsequently narrowed that exception by holding a plaintiff may only recover if he was"unacceptably forced to choose between risking criminal liability or being discharged..." *Winters*, 795 S.W.2d at 724.

However, we do not read *Winters* so narrowly as to hold that an employer must directly confront an employee and make an affirmative statement that the employee will be terminated if he refuses to perform an illegal act. Such a holding would insulate employers from liability so long as they merely asked the employee to do the illegal act, without mentioning possible termination, and then, if the employee refused, later discharge him. The fact that an employee refused to perform an action, whether legal or not, can be viewed as insubordination. Employees are always subject to discharge for insubordination, consequently, when an employer asks an employee to perform some act which is illegal, he automatically puts the employee to the "unacceptable" choice of risking criminal

> liability or being discharged because the employee is placed under the onus of being terminated for insubordination. 889 S.W.2d at 413.

Of course, in Tunisia Ivan Andrick didn't even have that choice. He risked criminal liability and incarceration if the continuing Pool criminal activity were to be uncovered, as well as the prospect of eventually being discharged for refusal to engage in the illegal conduct.

Constructive discharge is the traditional term used by the courts in age discrimination cases to describe the process by which Pool caused the termination of Ivan Andrick's employment by Pool in Tunisia. In the Fifth Circuit case of *Guthrie v. Penny Company, Inc.*, 803 F.2d 202 (5th Cir. 1986), the court defined the theory of constructive discharge:

> An employee can prove constructive discharge by showing that his employer created conditions so intolerable that 'a reasonable person in the employee's shoes could have felt compelled to resign....'
>
> The inquiry focuses on the employee's state of mind, and the employer's intent in creating the allegedly intolerable conditions is irrelevant at this stage.... However, the test remains objective, because it turns, not on the plaintiff's actual reaction, but on the reaction of a 'reasonable employee' in his position. *Id.* at 207. (citations omitted).

The constructive discharge doctrine was originally developed in unfair labor practice cases, and then applied to employment discrimination actions as a legal substitute for the discharge element of a prima facie case of discrimination. *See Junior v. Texaco*, Inc., 688 F. 2d 377 (5th Cir. 1982). It has been frequently used in age discrimination cases. *See also* Alan G. Skutt, Annotation, *Circumstances Which Warrant Finding Of Constructive Discharge In Cases Under Age Discrimination in Employment Act*, 93 A.L.R. FED 10 (1989). Sophisticated employers who want to fire an employee for an illegal reason have frequently tried to make the employee quit instead, in the hopes of providing the basis for a phony defense of resignation. Early on, the courts identified this subterfuge and dealt with it. As is stated in *Guthrie, supra*, the test for constructive discharge is whether under the circumstances it is reasonable to expect the employee to resign under the conditions to which he is being subjected. The point of view of the employer is irrelevant.

Without the doctrine of constructive discharge, none of the employment discrimination laws would be enforceable. Even the least sophisticated and devious employer wanting to rid itself of an "undesirable" employee can make working conditions intolerable to anyone. Certainly the courts, and particularly the Fifth Circuit, have had no problem in finding an employee to have been constructively discharged under conditions much less dangerous and desperate than those in which Andrick found himself in Tunisia working for Pool. (R 1361-1365) A representative sampling of those Fifth Circuit cases, all involving findings of constructive discharge to establish wrongful terminations in age and other discrimination cases, are found in the recent case of *Barrow v. New Orleans Steamship Assoc.* 10 F.3d 292, 300 n. 20

(5th Cir. 1991), where a managerial employee who was a college graduate was reassigned to janitorial duties. In none of the cited cases was the life and liberty of the employee placed at risk, as was Andrick's (R 1361-1365).

The Texas Supreme Court has not yet ruled on the issue of whether the *Sabine Pilot* exception to the employment at will doctrine applies in a case wherein an employee resigned rather than submit to continual pressure to engage in criminal conduct, although the discussion of this issue in *Higgenbotham, supra,* is certainly a well-reasoned indication that it will. Any decision other than to apply *Sabine Pilot* would emasculate that doctrine, and leave employers free to torture employees who refuse to engage in criminal conduct until they either submit or resign without legal recourse. The same public policy from which the exception grew requires recognition of the "constructive discharge" doctrine.

At least one other state court faced with this issue had no problem in prohibiting the *constructive* discharge of an employee who refused to engage in illegal conduct. *See Sterling Drug v. Oxford,* 743 S.W. 2d 380 (Ark. 1988).

The District Court held that "as Andrick was not terminated from the position in Tunisia but resigned from that position, he cannot as a matter of law pursue a cause of action for wrongful termination."(Order of the District Court, p.12). By that ruling the court "has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers." (Supreme Court Rules, Rule 10).

In *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993), this Court has recently spoken on the subject of onerous working conditions in a case involving a sexually hostile work environment. Sexual innuendos directed by a male supervisor to a female employee created such a hostile and abusive work environment that the employee was justified in resigning. Ivan Andrick's working conditions were much worse than hostile or abusive. They were impossible, and physically threatening. His liberty, as well as his job, was at risk. He had to resign to avoid engaging in criminal activity, or eventually be fired. In the meanwhile, he risked incarceration if he refused to follow the orders to break Tunisian law. It is absurd to say that our system of justice offers him no remedy.

Conclusion and Prayer

This court should grant the petition for writ of certiorari and reverse the courts below and remand for trial.

Respectfully submitted,

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APPENDIX A

29 USC § 621. Congressional statement of findings and purpose

29 USC § 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * *

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because

such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

IVAN ANDRICK AND HELEN ANDRICK	§	
Plaintiffs,	§	
v.	§	
	§	
POOL ENERGY SERVICES CO., ET AL,	§	CIVIL ACTION NO. H-94-893
Defendants.	§	

ORDER

Pending before the Court is the Motion for Leave to File Motion for Summary Judgment in Excess of the Page Limits (Document #39) filed by defendants Pool Energy Services Company ("Pool") and R.G. Hale ("Hale"), the Motion for Summary Judgment (Document #41) filed by Pool and Hale, and the Motion for Judgment on the Pleadings (Document #69) filed by Pool and Hale. Having considered the motions, submissions, and applicable law, the Court determines that these motions should all be granted.

Plaintiffs Ivan Andrick and Helen Andrick filed their original petition in state court alleging causes of action for age discrimination, intentional infliction of emotional distress, fraud, conspiracy to defraud, and unlawful termination with the intent to deny pension benefits after Ivan Andrick was terminated from employment on March 31, 1993. Defendants removed this action to this Court pursuant to federal subject matter jurisdiction on March 17, 1994. In

September, 1994 Pool offered Ivan Andrick the a position with the company in Tunisia in September 1994 which he accepted. Subsequently, Ivan Andrick resigned from that position and filed an amended complaint in this case alleging a cause of action for wrongful termination for refusal to commit an illegal act in connection with his employment in Tunisia.

The undisputed facts in this case are that in May 1962, Ivan Andrick began his employment with a company which was subsequently acquired by Pool. From 1962 until March 31, 1993 Ivan Andrick was continuously employed with affiliates of Pool. From 1989 through March 1993, he was employed by Intairdril Oman L.L.C., an Oman company which was 49% owned by an indirect subsidiary of Pool. The primary business of Intairdril Oman L.L.C. wile Ivan Andrick was in its employment was derived from a contract in place with Petroleum Development Oman L.L.C. ("P.D.O."). On December 31, 1992, this contract was terminated necessitating the eventual cessation of Pool's operations in Oman. As area manager in Oman, Ivan Andrick was responsible for organizing the scaling down operations. Ivan Andrick's supervisor was Hale. Russell Alexander ("Alexander") was placed into the position of resident superintendent by Ivan Andrick to complete the cessation operations in Oman. At the time, Alexander was 37 years old.

Thereafter, Ivan Andrick was terminated from employment. Andrick argues that Hale assured him that he would be placed in a different position with the company in either Italy, Ecuador, Tunisia, Malaysia, or the United States. Andrick further argues that the company had always placed him in another position after the completion of an operation and that he had no reason to expect otherwise in this instance.

Pool and Hale filed the instant motions arguing that all of the plaintiffs' causes of action should be dismissed as they cannot establish a genuine issue of material fact necessary to sustain the claims. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. of Civ. Proc. 56(c). Thus, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *See also State Farm Life Ins. Co. v. Guttermann*, 896 F.2d 116, 118 (5th Cir. 1990).

Defendants argue that Ivan and Helen Andrick's claim of age discrimination should be dismissed. Plaintiffs filed the age discrimination cause of action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621, *et seq.* Pursuant to the ADEA, in order to establish a prima facie case of age discrimination, a plaintiff must establish: (1) that he/she was discharged; (2) that he/she was qualified for the position; (3) that he/she was within the protected class at the time of the discharge; (4) that he/she was replaced by someone outside the protected class, replaced by someone younger, or otherwise discharged because of age. *Bodenheimer v. PPG Indus. Inc.*, 5 F.3d 955, 957 (5th Cir. 1993). If the plaintiff meets these requirements, there is a presumption of discrimination which the defendant must rebut by articulating a legitimate non-discriminatory reason for the discharge. *Id.* If the employer successfully rebuts the presumption of age discrimination, the employee's prima facie case dissolves. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10

(1981). The plaintiff then has the burden of establishing that the proffered reasons, as stated by the employer are not the real reasons for the discharge but are pretextual. However, not only must the plaintiff establish that the employers' stated reasons pretextual, but are pretextual for *age discrimination*.

In the instant case, Ivan Andrick argues that the Court should consider not only the position in Oman, but the various positions in other countries in which Pool operated, (such as Malaysia, Ecuador, Italy, Alaska, and Tunisia) in determining whether he has established a prima facie case of age discrimination. The Court determines that Ivan Andrick has established a prima facie case for age discrimination pursuant to the aforementioned factors. However, Helen Andrick has failed to establish a primae facie case for age discrimination as she had not demonstrated that she was ever employed or discharged by the defendants. Thus, Helen Andrick's ADEA claims are properly dismissed.

Having established a prima facie case of age discrimination, Pool and Hale have provided legitimate, non-discriminatory reasons for their decision to terminate Ivan Andrick. First, as the operations in Oman were being terminated, Alexander was placed in a position to wind-down operations. Alexander was receiving approximately 35% less compensation that was Ivan Andrick and was placed in an inferior position. Thus, the decision to retain Alexander in Oman to oversee the cessation operations at a reduced salary than Andrick was receiving, is a legitimate, non-discriminatory reason.

Concerning the other positions in the various counties in which Andrick argues that he could have been placed, the defendants have provided legitimate, non-discriminatory reasons for these decisions based on the experience, abilities, success at building the company's reputation, and the

relationship with the clients of the managers in those positions. In sum, the company simply did not have an available position for Andrick and his Court will not second guess the business decisions of the defendants. "The ADEA was not intended to be a vehicle for judicial second-guessing of employment decisions, nor was it intended to transform the courts into personnel managers." *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1504 (1988).

As the defendants have provided legitimate explanations for not placing Andrick in another position, he must prove that the proffered reasons stated are pretexts for age discrimination. At the summary judgment stage, the Court's inquiry is whether the plaintiff has tendered factual evidence that would lead a jury to reasonable conclude that the employer's reasons are a pretext for age discrimination. *St. Mary's Honor Society v. Hicks*, 113 S.Ct. 2742, 2747 (1993). Andrick has provided no factual evidence to establish that there is a fact question concerning pretext. Thus, Ivan Andrick's ADEA claims should also be dismissed.

The defendants argue that Ivan and Helen Andricks' claims for intentional infliction of emotional distress should also be dismissed. The plaintiffs' allege that the defendants' treatment of Ivan Andrick in terminating him after 30 years service and in failing to recognize his contribution to the company constitute a cause of action for intentional infliction of emotional distress. Specifically, plaintiffs' state that Andrick was not recognized for his 30 years of service to the company, he was summarily fired without prior warning, notice or cause, he was exploited by Hale by having to select and train his "replacement" while being told that there was another position available for him, he was humiliated by his sudden termination, and further embarrassed when Hale invited him to a retirement party in his honor. Helen

Andrick alleges that the defendants intentionally caused her emotional distress by depriving her husband of an income and a paycheck that she was accustomed to receiving, causing her embarrassment, having her husband around the house and causing her to do more housework as a result, and being limited in her social activities because her husband was at home all day. *See* Document #55 (deposition of Helen Andrick).[1] However, she also stated in her deposition that had enough money to live comfortably on and was receiving retirement benefits from Pool. *Id.*

The elements of the cause of action for intentional infliction of emotional distress are: (1) the defendant acted intentionally or recklessly, (2) the conduct was extreme and outrageous, (3) the actions of the defendant caused the plaintiff emotional distress, and (4) the emotional distress suffered by the plaintiff was severe. *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993). The issue of whether the defendants' actions were outrageous is a question of law for the Court to determine. *See Wornick Co. v. Casas*, 856 S.W.2d 732, 733 (Tex. 1993). Outrageous conduct is that which "[goes] beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at 734 (citing the Restatement 2d of Torts, § 46).

As Texas is an at-will state, the act of terminating an employee is in and of itself a legal right of the employer and can not be, by itself, the basis for an allegation of outrageous

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[1] The amended complaint states "[a]dditionally, the defendants knew that Helen Andrick, the wife of Ivan Andrick, was dependent on the income of her husband. Instead of looking forward to retirement and enjoyment of their golden years, these people are faced with the grim and bleak uncertainty of starting a new career at age 64." *See* Document #65 at 2.

behavior. *Id.* at 735. In the instant case, none of the actions of the defendants in terminating Andrick constitute outrageous conduct such that would "exceed all possible bounds of decency" and would be "utterly intolerable in civilized community." *Id.* (citations omitted). Defendants acted within their legal rights in terminating Andrick and making the decision not to place him in another position. The resulting consequences of his termination, i.e. feelings of embarrassment, humiliation, and not having a paycheck are all unfortunate effects of a termination and do not in and of themselves constitute outrageous conduct. Furthermore, the company's failure to recognize Andrick's 30 years of service to the company and giving him a retirement party do not, as a matter of law, constitute outrageous conduct. Helen Andrick's allegations that the company caused her humiliation, embarrassment, additional housework, and limited her social activities does not constitute, as a matter of law, "outrageous conduct." Thus, the Court determines that the Andricks' cause of action for intentional infliction of emotional distress should be dismissed.

The defendants also argue that summary judgment is appropriate on plaintiffs' fraud and conspiracy to defraud claims. Ivan Andrick alleges that the defendants fraudulently induced him to select and train Alexander to replace him by falsely informing him that he would be placed in another position and subsequently terminating him. The elements of a cause of action for fraud are" (1) a material representation was made; (2) that it was false or made recklessly without any knowledge of its truth and as a positive assertion; (4) that it was made with the intention that it should be acted upon by the party; (5) that the party acted in reliance upon it; and (6) the party thereby suffered injury. *Tranholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1993).

In the instant case, Pool lost the contract with PDO necessitating the need for the company to cease operating in Oman. Andrick acknowledges that it was necessary to close the company down. *See* Document #40, exhibit D (deposition of Ivan Andrick). Andrick also acknowledges that Russell, who was selected and trained by Andrick to oversee the operations in Oman, did not have the same responsibilities that Andrick had, had as area manager in Oman. *Id.* Andrick also acknowledges that as part of his recommendation for closing down operations in Oman that his position be eliminated. *Id.* Finally, Andrick concedes that no one specifically told him that he would be transferred to another position if the area manger position in Oman was eliminated. *Id.* Thus, as a matter of law, Andrick has admitted that there was no material misrepresentation upon which he relied. In selecting and training Alexander to take over the remaining operations in Oman, Andrick was simply doing his job and carrying out what was the best business practice for his employer. The company attempted to place Andrick in another position but at that time, there was nothing available. When an opportunity did become available in September 1994, Hale offered and Andrick accepted the job in Tunisia. Thus, as there was no material misrepresentation made, the plaintiffs' fraud claims should be dismissed.

The elements of a cause of action for conspiracy to defraud include: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more fraudulent, overt acts, and (5) damages as the proximate result. *Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1, 5 (Tex. App.-- Corpus Christi 1991, no writ). The Court has already determined as a matter of law, that there is no sustainable cause of action for fraud. Therefore, there cannot be a cause of action for conspiracy to defraud. Furthermore, as a matter of law, a

corporation or other company cannot conspire with itself, no matter how many of its agents participate in the activity. *Nelson Radio and Supply Co., Inc. v. Motorola*, 200 F.2d 911, 914 (5th Cir. 1952). Thus, the cause of action for conspiracy to defraud should also be dismissed.

Plaintiffs' claim of unlawful termination with the intention of denying ERISA benefits should also be dismissed. 29 U.S.C. § 1140 states *inter alia*:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan...

Ivan Andrick argues that after he was terminated, had the company placed him in a position in the United States, he would have become eligible to receive ERISA benefits to which employees in foreign countries were not entitled. Thus, Andrick is alleging that although he would have accepted a position in any of the various foreign countries where Pool had opportunities and where he would not have been eligible for ERISA benefits, that because one of the places he could have been placed was in the United States, where he would have been eligible for ERISA benefits, that he was terminated to prevent him from obtaining these benefits.

In *Hines v. Massachusetts Mutual Life Ins. Co.*, 43 F.3d 207 (5th Cir. 1995) the Court affirmed the district court's order granting summary judgment in favor of the defendant where the plaintiff challenged the denial of ERISA

benefits pursuant to § 1140. The Court stated that "an essential element of a Section 510 claim is proof of defendant's specific discriminatory intent." *Hines*, 43 F.3d at 209. Specific intent is a state of mind as such need not be proved as a fact, but may be inferred from the circumstances of the transaction and actions of the Defendant. *Cupit v. Whitley*, 28 F.3d 532 (5th Cir. 1994). Andrick has failed to provide any summary judgment evidence to support his claim of termination to prevent him from obtaining ERISA benefits, and as such, he has clearly failed to meet his summary judgment burden of establishing a genuine issue of material fact concerning the issue of specific discriminatory intent. In fact, in Andrick's deposition testimony, he admits that he was not terminated to prevent him from obtaining ERISA benefits. *See* Document #40, exhibit D at 116-17 (Ivan Andrick's deposition).

Helen Andrick's claim for wrongful termination of ERISA benefits should also be dismissed as she was neither a participant nor a beneficiary in any ERISA plan. Helen Andrick argues that she has a community property interest in her husband's recovery. However, as Ivan Andrick has failed to establish a genuine issue of material fact on the wrongful denial of ERISA benefits, Helen Andrick has no such claim.

Finally, plaintiffs have alleged in the amended complaint a cause of action for wrongful termination at common law. The Andricks allege that after Ivan Andrick assumed his duties in Tunisia, he became aware of a long-standing scheme by Pool to defraud the government of Tunisia of its' employees' income taxes. Andrick alleges that he protested this practice but the scheme continued and as a consequence, he involuntarily resigned and returned to the United States. Defendants have moved to have this claim dismissed as a matter of law arguing that because Ivan

Andrick was not terminated but rather that he voluntarily resigned, he cannot state a claim for wrongful termination.

The Texas Supreme Court in 1985 recognized an exception to the at-will employment doctrine: wrongful termination for refusal to commit an illegal act. *Sabine Pilot Serv. Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1993). However, as Andrick was not terminated from the position in Tunisia but resigned from that position, he cannot as a matter of law pursue a cause of action for wrongful termination. Thus, this cause of action should be dismissed. Based on the foregoing, the Court hereby

ORDERS the following:

(1) the motion for leave to file motion for summary judgment in excess of the page limits (Document #39) is GRANTED;

(2) the motion for summary judgment (Document #40) is GRANTED; and

(3) the motion for judgment on the pleadings (Document #69) is GRANTED.

SIGNED at Houston, Texas, on this 31 day of May, 1995.

/s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX C

U.S. COURT OF APPEALS
FILED
JAN 18 1996
CHARLES R. FULDRUG III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20450
Summary Calendar

IVAN ANDRICK; HELEN ANDRICK,
Plaintiffs-Appellants,

versus

POOL ENERGY SERVICES, Co; R. G. Hale,
Defendants-Appellees,
and
LOUIS E. DUPREE,
Defendant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-94-CV-893

Before WIENER, PARKER and DENNIS, Circuit Judges.

PER CURIAM:*

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* Pursuant to Local Rule 47.5, the court has

determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4

Appellants Ivan and Helen Andrick appeal from the district court's order denying their lawsuit under the Age Discrimination in Employment Act, 29 U.S.C. § 621, and various state theories, including fraud, intentional infliction of emotional distress, and constructive discharge. They argue that the district court erred in evaluating their claims and in applying federal and state law. We have reviewed the record and the magistrate judge's report and recommendation and find no reversible error. Accordingly, we affirm for essentially the reasons given in the district court's order granting the defendants' motions for summary judgment and for judgment on the pleadings. *Andrick v. Pool Energy Services, Co., et al.*, No. H-94-983 (S.D. Tex. June 1, 1995).

Appellants' motion to file a reply brief out-of-time is DENIED and appellees' motion to strike the proposed reply brief is GRANTED.

AFFIRMED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20450

IVAN ANDRICK; HELEN ANDRICK
Plaintiffs - Appellants

v.

POOL ENERGY SERVICES, Co; R G HALE
Defendants - Appellees

and

LOUIS E. DUPRE
Defendant

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

(February 22, 1996)

Before WIENER, PARKER and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Robert M. Parker
ROBERT M PARKER
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
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THE MANDATE

Supreme Court, U.S.
FILED
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(2)

No. 96-14

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

IVAN ANDRICK AND HELEN ANDRICK,
Petitioners,
v.
POOL ENERGY SERVICES CO. AND RON G. HALE
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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49 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether summary judgment for the employer is appropriate in an age discrimination case brought under the ADEA in which the discharged employee has set forth evidence to support a *prima facie* case, but has failed to present evidence to establish that the legitimate, non-discriminatory business reason for the discharge proffered by the employer is false and pretextual, or that the discharge was motivated by age discrimination.

2. Whether the exception to the employment at will doctrine in Texas established by *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 773 (Tex. 1985), prohibiting discharge of an employee for refusal to commit an illegal act, should be extended to a case in which the employee voluntarily resigns and alleges that he was constructively discharged for refusal to engage in a criminal conspiracy.

LIST OF ALL PARTIES

PETITIONERS:

IVAN ANDRICK
HELEN ANDRICK

RESPONDENTS:

POOL ENERGY SERVICES CO.
RON G. HALE

LIST OF AFFILIATED CORPORATIONS:

POOL ENERGY SERVICES CO. HAS NO PARENT COMPANIES OR NON-WHOLLY OWNED SUBSIDIARIES

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The Opinions and Decisions of the United States Court of Appeals for the Fifth Circuit are enclosed and printed as Appendices B and C. The Opinion and Decision of the United States District Court for the Southern District of Texas is enclosed and printed as Appendix A.

BASIS FOR JURISDICTION

1. Petitioner incorrectly asserts that jurisdiction is conferred on the Court by 28 U.S.C. § 1291. The basis for this Court's exercise of jurisdiction is 28 U.S.C. § 1254.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the District Court and United States Court of Appeals for the Fifth Circuit

The district court granted Defendants' Motion for Summary Judgment on Ivan Andrick's age discrimination claim, specifically ruling that while Plaintiff Ivan Andrick presented sufficient evidence to raise a fact issue to establish a *prima facie* case, Defendants presented legitimate, non-discriminatory reasons for the discharge, and Plaintiff failed to provide any evidence to establish that there is a fact question concerning pretext. (Appendix A, p. 5a) The district court's opinion was affirmed without further written opinion by the Fifth Circuit. (Appendix B, p. 13a) Petitioner has incorrectly stated the issue which could be considered by the Supreme Court by implying incorrectly that the district court found evidence of pretext.

The district court granted Defendants' Motion for Judgment on the Pleadings, dismissing Plaintiffs' claim for wrongful termination at common law as a matter of law

because Andrick alleges that he involuntarily resigned from his position in Tunisia after he became aware of an alleged fraudulent tax practice conducted by Pool in Tunisia. The district court correctly ruled that "the Texas Supreme Court in 1985 recognized an exception to the at-will employment doctrine: wrongful termination for refusal to commit an illegal act. *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985). However, as Andrick was not terminated from the position in Tunisia but resigned from that position, he cannot as a matter of law pursue a cause of action for wrongful termination." (Appendix A, p. 11a)

Plaintiff Ivan Andrick's age discrimination claim arose out of his employment in Oman. Mr. Andrick was employed by Intairdril Oman L.L.C., an Oman company 49% of which is owned by an indirect subsidiary of Defendant Pool Energy Services Co. ("Pool"), and 51% of which is owned by Muscat Trading Company, an Oman company not otherwise affiliated with Pool, prior to his employment termination on March 31, 1993. Mr. Andrick's direct supervisor prior to his employment termination was Defendant Ron G. Hale ("Hale"). On September 27, 1993, Ivan Andrick filed charges with the Equal Employment Opportunity Commission ("EEOC"), alleging that Pool discriminated against him in terminating his employment because of his age. On February 11, 1994, Ivan Andrick and his wife, Plaintiff Helen Andrick, sued Defendants Pool and Hale in state court, each asserting claims for alleged age discrimination, intentional infliction of emotional distress, fraud, conspiracy to defraud, and unlawful termination with the intention of denying pension benefits, allegedly arising

out of the employment termination of Ivan Andrick on or about March 31, 1993. (R. 1, at p. 13)[1]

On March 17, 1994, Defendants removed this case to federal court after timely answering in state court. (R. 1, at p. 19) Defendants filed their First Amended Answer specifically denying all claims by Plaintiffs Ivan Andrick and Helen Andrick and raising various affirmative defenses. (R. 35, at p. 411) In August 1994, Pool offered Ivan Andrick reemployment in Tunisia. Ivan Andrick accepted reemployment but subsequently resigned. On March 17, 1995, Ivan Andrick and Helen Andrick filed their Motion for Leave to Amend, seeking to amend their complaint to add a cause of action for wrongful termination at common law, alleging that Ivan Andrick was constructively discharged from his employment in Tunisia for refusing to commit an illegal act. (R. 50, at p. 1287) On April 13, 1995, the Court granted Plaintiffs' Motion for Leave to Amend, allowing them to add the additional cause of action for wrongful termination at common law. (R. 63, at p. 1433)

On February 27, 1995, Defendants filed their Motion for Summary Judgment, asking the court to grant summary judgment on all claims asserted by Plaintiffs against Defendants in their Original Petition. (R. 40, at p. 706) On May 9, 1995, the Defendants filed their Motion for Judgment on the Pleadings, seeking judgment as a matter of law on Plaintiffs' cause of action for wrongful termination at common law as asserted in their First Amended Petition. (R. 69, at p. 1468) On May 31, 1995, the district court granted

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[1]Citations to the Record on Appeal will utilize the docket item numbers assigned by the district court clerk, followed by the relevant page number in the record. Thus, for instance, a citation to docket item number 13, record page number 56, would appear "(R. 13, at p. 56)."

Defendants' Motion for Summary Judgment and Motion for Judgment on the Pleadings. (R. 71, at p. 1484)

The district court granted Defendants' Motion for Summary Judgment on Ivan Andrick's cause of action for age discrimination, on the grounds that Defendants established a legitimate, non-discriminatory reason for their decision to terminate Ivan Andrick's employment in Oman, and the Plaintiffs failed to tender factual evidence that would lead a jury to conclude that the employer's reasons are a pretext for age discrimination. The district court specifically found that "Andrick has provided no factual evidence to establish that there is a fact question concerning pretext." (Appendix A, p. 5a) The district court granted judgment on the pleadings on Ivan Andrick's Texas common law claim for wrongful termination of his employment in Tunisia asserted under the exception to the at-will doctrine recognized by the Texas Supreme Court in *Sabine Pilot*, because Ivan Andrick pled that he resigned from his position and was not terminated, and cannot as a matter of law pursue a cause of action for wrongful termination. (Appendix A, p. 5a)

B. Statement of Facts Regarding Ivan Andrick's Employment

Defendant Pool Energy Services Co. has no employees. (R. 40, at p. 501) It is the legal entity owner of Pool Energy Holding, Inc., which owns Pool Company. (R. 40, at p. 501) In May 1962, Mr. Andrick began his employment with a company which was subsequently acquired by Pool Company. (R. 40, at p. 501) He was since then, through March 31, 1993, continuously employed with affiliates of Pool Company. (R. 40, at p. 501) Hale, as Group Vice President--International Operations for Pool, was Ivan Andrick's employment supervisor from June 1989,

until his employment termination in March 1993. (R. 40, at p. 648, § 2) From November 1989 through March 1993, Mr. Andrick was employed as area manager of Intairdril Oman L.L.C. (R. 40, at p. 648, § 2) Intairdril Oman L.L.C. is in the business of oil well servicing and workovers, and air drilling operations. (R. 40, at p. 597)

Pursuant to his request, Mr. Andrick was awarded the position of area manager of Intairdril Oman L.L.C. by Hale in late 1989, when a vacancy occurred. (R. 40, at pp. 597-598) Ivan Andrick was not promised at any time that his employment would be continued for any specific length of time. (R. 40, at pp. 589-590)

The primary business of Intairdril Oman L.L.C. while Ivan Andrick was in its employment was derived from a contract in place with Petroleum Development Oman L.L.C. ("PDO Contract"). (R. 40, at p. 647, § 3; R. 40, at p. 595) This contract was terminated December 31, 1992. (R. 40, at p. 647, § 3; R. 40, at p. 585) Due to the loss of the PDO Contract, the company's operations in Oman essentially ceased, and only a skeletal staff of employees remained for the purpose of maintaining customer contacts in Oman and possibly obtaining new business. (*Id.*) The PDO Contract had been "the life of" Intairdril Oman L.L.C. (R. 40, at p. 586)

As area manager over the Oman operations, Mr. Andrick made the recommendations concerning winding down of operations in Oman. (R. 40, at pp. 584, 581-583, and 531-539) In Mr. Andrick's November 1992 written recommendations to Hale concerning winding down of operations in Oman, Mr. Andrick recommended that Russell Alexander, date of birth March 5, 1955, be retained as a field superintendent on resident status. (*Id.*)

Mr. Alexander's employment position prior to termination of Mr. Andrick's employment was also field superintendent, but his position was to be changed to a resident status. (R. 40, at p. 647, § 4) Mr. Andrick's recommendation was accepted, and a resident superintendent position was created coincident with the elimination of the area manager position held by Ivan Andrick. (*Id.*)

Russell Alexander, as field superintendent, did not have the same responsibilities subsequent to Mr. Andrick's employment termination as Mr. Andrick had held as area manager. (R. 40, at p. 647, § 5) Mr. Andrick's annual base salary as area manager, with area differential and cost of living allowance, totalled $97,440, 35% higher than Mr. Alexander's $63,118. (R. 40, at p. 500, § 3; *see* R. 40, at p. 577) The operational revenues for the Oman operations and operations managed from Oman averaged $1,099,500 per month in 1990, $1,067,833 per month in 1991, $759,000 per month in 1992, and in March 1993, the final month of Mr. Andrick's employment, such revenues were $105,000. (R. 40, at p. 500, § 3) The Oman operations employed a total of 99 people at the end of January 1993, and a total of 15 people in September 1993. (*Id.*)

The decisions with respect to staffing in Oman were necessitated by the loss of contracts and were made for sound business reasons. (R. 40, at p. 647, § 6) Mr. Andrick concedes that the elimination of the position of area manager of Intairdril Oman L.L.C. was the correct decision. (R. 40, at pp. 575-576) Mr. Alexander was offered and accepted the resident superintendent position, which was not the same level position held by Mr. Andrick as area manager. (R. 40, at p. 578) Ivan Andrick further told the Texas Employment Commission under oath that his employment was terminated because of "the lost contract with PDO and no position available"; he said nothing about such termination being because of his age. (R. 40, at pp. 549-550, and p. 530)

Ivan Andrick's employment was terminated by Hale, as Vice President of International Operations and his direct supervisor, effective March 31, 1993, for the reason that the position of area manager was eliminated due to the loss of the PDO Contract, and the fact that there was no suitable position available elsewhere in the company. (R. 40, at p. 647, § 6) Hale made the decision to terminate Mr. Andrick's employment. (*Id.*) Age played no factor in the decision to terminate Ivan Andrick's employment. (*Id.*)

Ivan Andrick admitted in his deposition that neither Hale nor any Pool employee ever promised that he would be transferred to another position when his position of area manager in Oman was eliminated. (R. 40, at pp. 573-574)

Ivan Andrick asserts to the Court that he should have been considered for jobs in Tunisia, Italy, Ecuador, Malaysia, and Alaska. The positions for which Mr. Andrick alleges he should have been considered in Italy and Tunisia would be under the supervision of Frank Schirmacher, Regional Vice President, Europe, for Pool. (R. 40, at p. 499, § 2) Pursuant to Hale's request, Frank Schirmacher did consider Ivan Andrick for the opening caused through the departure of John Joy in Tunisia, as well as for the position of general manager in Italy. (R. 40, at p. 499, § 2) The Tunisia job was not awarded to Mr. Andrick due to the fact that the company was very close to the end of its contract with KUFPEC, its customer at that time, and it was felt to be more effective to let another existing employee, Alan Porter, phase that operation out as he had already run the Tunisia operation prior to the arrival of John Joy. (*Id.*)

In Italy, in early 1992, the company had concerns regarding the performance of Steve Carlson. However, by late 1992, Steve Carlson had done an excellent job rebuilding his and the company's image with the customer, and because

of this fact, plus the fact that operations in Italy were decreasing with the loss of a rig contract in March 1993, Steve Carlson was retained in his position in Italy to wind down the operation, thus not creating an opening for Ivan Andrick in Italy. (R. 40, at pp. 498-499, § 2) Pool currently no longer has operations in Italy. (R. 40, at p. 498).

In the case of both the Tunisia and Italy operations, contract duration and decreasing operations without future contracts were the reasons for deciding not to select Ivan Andrick to fill these positions. (R. 40, at p. 498, § 4) Ivan Andrick's age played no factor in the decision not to select him to fill positions in Tunisia and Italy. (R. 40, at p. 498 § 4; R. 40, at p. 647, § 6).

Hale made the decision to select another existing employee, Steve Orso, to fill the position of manager in Ecuador. (R. 40, at p. 646, § 7) Steve Orso's date of birth is 8/18/35, and he is 60 years old. (R. 40, at p. 500, § 4) Steve Orso was awarded the Ecuador position because he was more qualified and experienced in the area of drilling and down-hole technology than Mr. Andrick. (R. 40, at p. 646, § 7) Ivan Andrick does not contest the fact that Steve Orso was qualified for the position in Ecuador. (R. 40, at p. 571)

In being awarded the position in Ecuador, Steve Orso vacated his position of general manager and managing director of a Pool affiliate in Malaysia. (R. 40, at p. 646, § 7) Kerry Kunz, the operations manager in Malaysia prior to Steve Orso's transfer, remained in the position of operations manager upon Steve Orso's transfer when Mr. Orso's position was eliminated, because Kerry Kunz was doing a good job and the client was happy with his performance. (*Id.*) Kerry Kunz was later on June 1, 1994,

promoted to general manager. (*Id.*) Steve Carlson was transferred from Italy to Malaysia also on June 1, 1994, as operations manager. (R. 55, at p. 1356)

Prior to Mr. Andrick's employment termination, Hale also checked with Bill Myers, Pool's Vice President of U.S. Operations, and Nick Petronio, Vice President of U.S. Land Operations, concerning employment opportunities in the domestic operations for Ivan Andrick, and was informed that there were no positions available for Mr. Andrick to assume. (R. 40, at p. 646, § 8; R. 58, at p. 1409, § 2) No position was available in Alaska prior to Ivan Andrick's employment termination.[2] (R. 58, at pp. 1408-1409) As such, Hale made the decision to terminate Mr. Andrick's employment effective March 31, 1993. (R. 40, at p. 647, § 6)

In September 1994, Plaintiff Ivan Andrick was offered and accepted the position of area manager in Tunisia, and was again employed by a company indirectly owned by Pool. (R. 40, at p. 646, § 9) The decision to select Ivan Andrick for the position of area manager in Tunisia was made by Hale. (*Id.*)

After Defendants filed their Motion for Summary Judgment on all claims raised in Plaintiffs' Original Petition, Ivan Andrick quit his job in Tunisia, and filed an Amended Petition, asserting that he "involuntarily resigned" because he

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[2]At the time of Ivan Andrick's employment termination effective March 31, 1993, Pool's general manager in Alaska was Kenneth V. Huseman. (R. 58, at p. 1409) Mr. Huseman later resigned this position by letter of resignation dated April 21, 1993, which became effective April 22, 1993. (*Id.*) As such, the Alaska position was not available at the time of Mr. Andrick's employment termination. (R. 58, at p. 1408) Furthermore, this position was filled by Dale Larsen, date of birth 6/28/44, a person in a protected class based on his age. (R. 58, at pp. 1408-1409)

was asked to report tax information to the Tunisian government, which he claims would be a violation of Tunisian law. (R. 65, p. 1438) Mr. Andrick claims that the conduct he was asked to commit was part of a "longstanding scheme by Defendant to defraud the government of Tunisia of its employees' income taxes." (*Id.*) Contrary to Petitioner's statements in his Petition for Writ of Certiorari, Plaintiffs did not plead that the conduct Mr. Andrick was allegedly ask to commit was in violation of United States law; only that it was a violation of *Tunisian* law.

REASONS FOR DENYING THE WRIT

A. The District Court Correctly Ruled that Defendants Provided Legitimate, Non-Discriminatory Reasons for Mr. Andrick's Discharge, and that no Evidence of Pretext has been Presented by Petitioner

The burden of proof for an Age Discrimination and Employment Act ("ADEA") disparate treatment claim proceeds through the same shifting analysis as used in a Title VII case that requires: (1) the plaintiff must demonstrate a *prima facie* case of discrimination; (2) the employer must then articulate a legitimate, non-discriminatory reason for its disputed action; and (3) the plaintiff must prove that the employer's asserted reason was merely a pretext for intentional discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981). The United States Supreme Court recently reemphasized that the plaintiff *always* has the burden of proving intentional discrimination by the employer. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *see also Burdine*, 450 U.S. at 252-53 ("the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff").

In order to establish a *prima facie* case under the ADEA, Ivan Andrick must prove that: (1) he was a member of a protected age group (40 years or older); (2) he was qualified to perform his job; (3) he was discharged; and (4) he was replaced by someone outside of the protected class or was otherwise discharged because of his age. *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 957 (5th Cir. 1993) (affirming summary judgment for employer); *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 815 (5th Cir.), *cert. denied*, 114 S. Ct. 467 (1993) (affirming summary judgment for employer). The district court found that Ivan Andrick has presented evidence which is sufficient to establish a *prima facie* case of age discrimination.

If it is determined that the Plaintiff has established a *prima facie* case of discriminatory discharge, Defendants must then set forth admissible evidence showing the legitimate, non-discriminatory reason for Plaintiff's employment termination. At this second stage of the disparate treatment analysis, Pool and Hale must produce evidence that Ivan Andrick was "rejected, or someone else was preferred, for a legitimate, non-discriminatory reason." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714 (1983). "[T]he defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Center*, 509 U.S. 502, 507 (1993) (citations omitted). At this stage, to satisfy their burden of production, the defendants "need only articulate a lawful reason, regardless of what its persuasiveness may or may not be." *Bodenheimer*, 5 F.3d at 958. Pool and Hale set forth for the court evidence which showed that Defendants terminated Ivan Andrick from his position as area manager in Oman for the legitimate, non-discriminatory reasons that the position of

area manager was eliminated due to the loss of the major contract which provided the bulk of business for Ivan Andrick's employer and there was no suitable position available elsewhere in the company, and not because of his age.

Ivan Andrick's employment was terminated after Intairdril Oman L.L.C. lost the PDO Contract and therefore lost the bulk of its business, and not because of Mr. Andrick's age. (R. 40, at p. 647, § 6) Plaintiff has admitted in his deposition that the decision to eliminate his position of area manager was the correct decision. (R. 40, at pp. 575-576) In fact, Ivan Andrick made the recommendations concerning the minimal staffing to be retained in Oman, including leaving Russell Alexander in the position of field superintendent to be the most senior person remaining in Oman. (R. 40, at pp. 584, 581-583, and 531-539)

Furthermore, Ivan Andrick was not given another position within the company as no suitable position was available. (R. 40, at p. 647, § 6) He was not put in Ecuador because Steve Orso, then age 57, was believed by Hale to be more qualified for that position because he was more qualified in the area of drilling and down-hole technology than Mr. Andrick. (*Id.*) Upon being awarded the position in Ecuador, Steve Orso vacated his position of general manager and managing director of ADSB, Pool's affiliate in Malaysia. Kerry Kunz, the operations manager in Malaysia prior to Mr. Orso's transfer, remained in the position of operations manager upon Mr. Orso's transfer when Mr. Orso's position was eliminated, because Mr. Kunz's performance was good and the client was happy with his performance. (*Id.*) On June 1, 1994, more than a year after Ivan Andrick's employment was terminated, Mr. Kunz received the title of general manager. (*Id.*)

Ivan Andrick was not put in Italy because no position opened up in Italy because Steve Carlson succeeded in rebuilding his and the company's images, and the operations in Italy were decreasing, so the decision was made not to remove Steve Carlson from the position he held. (R. 40, at pp. 498-499) Ivan Andrick was not put in Tunisia in 1993 because the contract then in effect there was getting close to the end, and it was believed to be more effective to allow Alan Porter, who had experience running the Tunisia operations, to phase that operation out. (R. 40, at p. 499)

Hale checked with Bill Myers, Vice President of U.S. Operations, and Nick Petronio, Vice President of U.S. Land Operations, and was informed that there were no positions available for Mr. Andrick to assume in the domestic operations. (R. 40, at p. 646, § 8) There was no position available in Alaska to assume prior to Ivan Andrick's employment termination. (R. 58, at pp. 1408-1409) Therefore, Ivan Andrick's employment was terminated by Hale effective March 31, 1993, for the legitimate non-discriminatory reason that his position was eliminated due to the loss of the PDO Contract, and there was no other suitable position available, and not because of his age. (R. 40, at p. 647, § 6)

Even if Plaintiff is able to establish a *prima facie* case, upon production by the employer of evidence showing a legitimate, non-discriminatory reason for the employer's decision, without evidence of pretext, summary judgment is appropriately granted for the employer. *Grisby v. Reynolds Metals Co.*, 821 F.2d 590 (11th Cir. 1987). Pretext means pretext for intentional age discrimination. "To show that the defendants' proffered reason was a pretext for [age] discrimination [the employee] must offer evidence not only that the defendants' proffered reason was false, but also that age discrimination was the real reason for the defendants'

action." *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292, 298 n. 22 (5th Cir. 1994). "[I]n ADEA cases a court considering summary judgment must decide whether plaintiff's facts, if believed, would prove that, more likely than not, the employer fired the employee because of his age." *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 959 (5th Cir. 1993). The plaintiff must show that his age was a determining factor, not merely a contributing factor, in his discharge. *Carolan v. Central Freight Lines, Inc.*, 489 F. Supp. 941, 944 (E.D. Tex. 1980); *Cunningham v. Central Beverage, Inc.*, 486 F. Supp. 59, 61 (N.D. Tex. 1980). "[A] jury issue will be presented and a plaintiff can avoid summary judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains." *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996). Substantial evidence, and not merely a scintilla of evidence, is required to create a jury question. *Rhodes*, 75 F.3d at 993.

The district court clearly correctly found that, "Andrick has provided no factual evidence to establish that there is a fact question concerning pretext." Ivan Andrick has not shown and cannot show that the legitimate, non-discriminatory reasons put forth by Defendants for selecting him for employment termination are pretext to mask intentional discrimination.

Ivan Andrick's own unsubstantiated theory concerning discrimination has been eliminated by specific facts. Mr. Andrick's assertion that he was qualified for other positions within the company shows no pretext for age discrimination. Defendants clearly set forth the legitimate, non-discriminatory reasons why Ivan Andrick was not

selected for positions in Tunisia, Italy, Ecuador, Malaysia, and Alaska. Mr. Andrick provided no evidence which would call into dispute the legitimate, non-discriminatory reasons set forth by Defendants for selecting other employees of the company to assume or to remain in these positions. Again, Kerry Kunz was not promoted to the position of general manager in Malaysia until June 1, 1994, more than a year after Ivan Andrick's employment was terminated. (R. 40, at p. 646 § 7) As shown by the employment records submitted by Plaintiffs as an exhibit to their Response to Defendants' Motion for Summary Judgment, Steve Carlson was not transferred from Italy to Malaysia until June 1, 1994, again more than a year after Ivan Andrick's employment was terminated. (R. 55, at p. 1356) Furthermore, when Ivan Andrick's employment was terminated effective March 31, 1993, no position was available in Alaska. (R. 58, at p. 1409) The position of general manager in Alaska was held by Kenneth V. Huseman. (R. 58, at p. 1409) Mr. Huseman resigned this position by letter of resignation dated April 21, 1993, which became effective April 22, 1993. (R. 58, at p. 1409) As such, the Alaskan position ***was not available*** at the time of Ivan Andrick's termination. Therefore, failure to consider Mr. Andrick for this position which was not available is no evidence of age discrimination. Furthermore, this position was filled by Dale Larsen, date of birth 6/28/44, a person also in a protected class based on his age. (R. 58, at pp. 1408-1409).

The district court correctly found that, "concerning the other positions in the various countries in which Andrick argues that he could have been placed, the defendants have provided legitimate, non-discriminatory reasons for these decisions based on the experience, abilities, success at building the company's reputation, and the relationship with the clients of the managers in those positions. In sum, the company simply did not have an available position for

Andrick and [t]his Court will not second guess the business decisions of the defendants." (Appendix A, p. 5a)

Plaintiff's subjective belief that he was selected for termination of employment because of his age is not sufficient to raise an issue of pretext when Defendants have presented proof of an adequate non-discriminatory reason for his discharge. *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 246 (5th Cir. 1985); *Elliott v. Group Medical and Surgical Serv.*, 714 F.2d 556, 564 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984). It is the perception of the decision maker which is relevant, and Plaintiff's own subjective personal judgments of his skills or qualifications do not raise a genuine issue of material fact. *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464-65 (7th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987) (the question is not whether the employer exercised prudent business judgment, but whether the employee has come forward to refute the articulated, legitimate reasons for his discharge; in this regard, the employee must do more than challenge the judgment of his superiors through his own self-interested assertions); *see also Sherrod v. Sears, Roebuck & Co.*, 785 F.2d 1312, 1315-16 (5th Cir. 1986). Statements by an employee regarding his subjective belief that his employment was terminated because of his age are insufficient to show pretext in the face of proof establishing an adequate, non-discriminatory reason for his discharge. *Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 435 (5th Cir. 1995); *Molner v. Ebasco Constr., Inc.*, 986 F.2d 115, 119 (5th Cir. 1993). "To make out an ADEA claim, the plaintiff must establish the existence of discrete facts that show some nexus between the employment actions taken by the employer and the employee's age." *Eli Lilly*, 990 F.2d at 819. Mr. Andrick's "bold assertion that one exists . . . simply will not suffice." *Id.*

As the Supreme Court recently stated, "Whatever the employer's decision-making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Hazen Paper v. Biggins*, 113 S. Ct. 1701, 1706 (1993); *see also Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633, 647 (5th Cir. 1985) (ADEA not intended to be a vehicle for a judicial second-guessing of business decisions, nor was it intended to transfer the courts into personnel managers). The employer is entitled to summary judgment when the evidence considered as a whole is insufficient to allow a jury to infer that age was the actual reason for the discharge. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996).

The only additional "facts" put forth by Mr. Andrick to support his age discrimination claim are statements Ivan Andrick alleges were made by Frank Schirmacher, Ivan Andrick's supervisor during his subsequent employment for Pool in Tunisia. Mr. Schirmacher clearly sets forth in his affidavit the legitimate, non-discriminatory reasons for selecting Alan Porter, an existing employee already in Tunisia to phase the operation out, and leaving Steve Carlson in his position in Italy. (R. 40, at pp. 498-499). Mr. Andrick asserts that Frank Schirmacher "admitted that, if Ron Hale had requested him to find a manager's position for Ivan Andrick in Tunisia or Italy at that time, he could and would have done so." Once again, this is simply no evidence of age discrimination and does not call into dispute the fact that other persons were awarded or retained in the positions in Tunisia and Italy, for the legitimate, non-discriminatory reasons set forth by Defendants. Hale is Vice President of International Operations and is Frank Schirmacher's boss. If Mr. Schirmacher was instructed by Hale to ignore an applicant's qualifications for a job and put a less qualified applicant in that position, Mr. Schirmacher

would have had no choice but to do that. As such, this alleged statement by Mr. Schirmacher put forth by Ivan Andrick does not show that the legitimate, non-discriminatory reasons for selecting employees other than Mr. Andrick for the Tunisia or Italy positions were pretextual, and does not show that the real reason that Ivan Andrick was not given these positions was because of his age.

Petitioners assert that this Court should consider this case to resolve perceived differences in the circuits in the application of the standard for summary judgment when faced with evidence of pretext. However, in this case, there *is no evidence of pretext*. As such, the question Petitioners would like the Court to address as to whether a plaintiff needs to present additional proof of age discrimination on top of substantial evidence of pretext cannot be reached.

Defendants have clearly established that Ivan Andrick's age played no role in the decision to select him for employment termination. The district court properly found that Defendants have provided legitimate, non-discriminatory reasons for eliminating Mr. Andrick's position in Oman and for not placing Ivan Andrick in another position and that Ivan Andrick has provided no factual evidence to establish that there is a fact question concerning pretext. As such, Respondents request that this Court deny Petitioners' request for issuance of Writ of Certiorari on Ivan Andrick's claim for age discrimination.

B. It is Undisputed that Texas has not Established a Cause of Action for Wrongful Termination at Common Law When an Employee Voluntarily Resigns and is not Terminated.

The district court correctly dismissed Ivan Andrick's Texas common law claim for wrongful termination because Ivan Andrick was not terminated, but rather voluntarily resigned from his employment in Tunisia, and therefore cannot state a claim for wrongful termination. After Defendants filed their Motion for Summary Judgment on all of Plaintiffs' claims asserted in their Original Petition, Plaintiffs filed their Amended Petition, adding a cause of action for "wrongful termination at common law." (R. 65, at pp. 1436-1440). In support of this cause of action for wrongful termination at common law, Plaintiffs added paragraph 12 on page 3 on their Amended Petition, asserting that:

> After assuming his duties as manager of the defendant's operations in Tunisia, Mr. Andrick became aware of a long-standing scheme by defendant to defraud the government of Tunisia of its employees' income taxes. Specifically, the defendant deliberately understated the salaries of its employees to the Tunisian government in order to avoid paying significant tax on that income. When Mr. Andrick became aware of this, he protested to his supervisors who ordered him to continue to participate in the scheme. Mr. Andrick protested. To continue any participation in the scheme would subject plaintiff to substantial jeopardy from the government of Tunisia including imprisonment. Because this scheme continued

> over plaintiff's protests, his continued employment became intolerable to any reasonable person. As a consequence, Mr. Andrick involuntarily resigned and returned to the United States.

(R. 65, at p. 1438)

In 1985, the Texas Supreme Court carved out a narrow exception to the employment-at-will doctrine, allowing pursuit of a cause of action for wrongful termination at common law under very limited circumstances. The *Sabine Pilot* exception states:

> We now hold that public policy as expressed in the laws of this state and the United States which carry criminal penalties, requires a very narrow exception to the employment-at-will doctrine . . . that narrow exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act. We further hold that in the trial of such case it is the plaintiff's burden to prove by a preponderance of the evidence that his discharge was for no other reason than his refusal to perform an illegal act.

Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985). Texas courts have interpreted this exception very literally and very narrowly. *See Medina v. Lanabi, Inc.*, 855 S.W.2d 161, 164 (Tex. App.--Houston [14th Dist.] 1993, writ denied) (noting that this is an "extremely narrow exception"); *Burt v. City of Burkburnett*, 800 S.W.2d 625, 627 (Tex. App.--Fort Worth 1990, writ denied) (same). The Texas supreme court has subsequently limited the exception

to situations where the employee is "unacceptably forced to choose between risking criminal liability or being discharged from his livelihood." *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723, 724 (Tex. 1990).

On the face of his Amended Petition, Mr. Andrick clearly pled that he was not terminated from his position of employment in Tunisia, but rather that he "involuntarily resigned." (R. 65, p. 1438) No Texas case has recognized the availability of a cause of action for wrongful termination under common law under the *Sabine Pilot* exception upon alleged constructive discharge, as opposed to actual termination. Under the current state of Texas law, the employer must take affirmative steps to discharge the employee.

The case cited to this court by Plaintiffs, *Higgenbotham v. Allwaste*, 889 S.W.2d 411 (Tex. App.--Houston [14th Dist.] 1994, writ denied), does not recognize a cause of action for wrongful termination under *Sabine Pilot* absent the firing of the employee. In *Higgenbotham*, the employee was fired. *Higgenbotham* did not even address the issue of whether a constructive discharge could be actionable under *Sabine Pilot*, as it was clear to the court that under both *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) and *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723 (Tex. 1990), that a firing must occur. *Higgenbotham*, 889 S.W.2d at 413. At issue in *Higgenbotham* was whether the threat to fire must necessarily accompany the request to perform the illegal act, or, if an employee who is ordered to do the illegal act and refuses and ***is subsequently fired*** can still show that the sole reason for his termination was his refusal to commit an illegal act. *Id.* (emphasis added). It is not the case that every employee who is asked to perform an illegal act by his employer will be fired if he refuses. To allow an employee to quit and sue

his employer at any time on the basis of an alleged request to perform an illegal act would destroy the employment-at-will doctrine.

The Texas Supreme Court in *Winters* discerned the two essential elements of the exception: (1) an order to engage in a criminal act; and (2) discharge for failing to do so. *Winters*, 795 S.W.2d at 724. The Court in *Sabine Pilot* noted that the refusal to perform the illegal act must be the sole reason for ***termination***. 687 S.W.2d at 735. *See also Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 953 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1110 (1995); *Paul v. P.B.-K.B.B., Inc.*, 801 S.W.2d 229, 230 (Tex. App.--Houston [14th Dist.] 1990, writ denied). As Mr. Andrick clearly pleads in his Amended Petition that he was not terminated by Defendants, but rather resigned, he may not recover for wrongful termination under the *Sabine Pilot* exception to the employment-at-will doctrine in Texas, and judgment on the pleadings was properly granted. (R. 65, p. 1438) Furthermore, Defendants also correctly asserted to the district court that judgment on the pleadings would also be properly granted on Ivan Andrick's cause of action for wrongful termination at common law because Ivan Andrick pled only that the conduct would violate Tunisian law, and not a Texas or United States criminal law, as required by *Sabine Pilot*.

It is undisputed that the Texas Supreme Court has not extended the *Sabine Pilot* doctrine to create a cause of action for wrongful discharge when an employee resigns and alleges constructive discharge and is not actually terminated by the employer. A federal court is not free to engraft on to state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State of Texas. *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975). A

federal court may act as a judicial pioneer when interpreting the United States Constitutional and federal law. *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112, 123 (3d Cir. 1993). However, federalism concerns require a federal court to leave to the state courts the task of expanding or restricting state common law. *Id.* Absent some authoritative signal from the legislature or the state courts, a federal court has no basis for even considering the pros and cons of innovative theories. *Id.* (quoting *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 424 (D.C. Cir. 1988)). As such Writ of Certiorari should not be granted to consider whether Texas common law should be modified and expanded to include a cause of action for wrongful discharge when an employee voluntarily resigns after allegedly being asked to commit conduct which is a violation of a foreign law.

CONCLUSION AND PRAYER

Ivan Andrick's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IVAN ANDRICK AND HELEN ANDRICK,	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO. H-94-893
POOL ENERGY SERVICES CO., ET AL.,	§	
Defendants.	§	

ORDER

Pending before the Court is the Motion for Leave to File Motion for Summary Judgment in Excess of the Page Limits (Document #39) filed by defendants Pool Energy Services Company ("Pool") and R.G. Hale ("Hale"), the Motion for Summary Judgment (Document #41) filed by Pool and Hale, and the Motion for Judgment on the Pleadings (Document #69) filed by Pool and Hale. Having considered the motions, submissions, and applicable law, the Court determines that these motions should all be granted.

Plaintiffs Ivan Andrick and Helen Andrick filed their original petition in state court alleging causes of action for age discrimination, intentional infliction of emotional distress, fraud, conspiracy to defraud, and unlawful

termination with the intent to deny pension benefits after Ivan Andrick was terminated from employment on March 31, 1993. Defendants removed this action to this Court pursuant to federal subject matter jurisdiction on March 17, 1994. In September, 1994 Pool offered Ivan Andrick a position with the company in Tunisia in September 1994 which he accepted. Subsequently, Ivan Andrick resigned from that position and filed an amended complaint in this case alleging a cause of action for wrongful termination for refusal to commit an illegal act in connection with his employment in Tunisia.

The undisputed facts in this case are that in May 1962, Ivan Andrick began his employment with a company which was subsequently acquired by Pool. From 1962 until March 31, 1993 Ivan Andrick was continuously employed with affiliates of Pool. From 1989 through March 1993, he was employed by Intairdril Oman L.L.C., an Oman company which was 49% owned by an indirect subsidiary of Pool. The primary business of Intairdril Oman L.L.C. while Ivan Andrick was in its employment was derived from a contract in place with Petroleum Development Oman L.L.C. ("P.D.O."). On December 31, 1992, this contract was terminated necessitating the eventual cessation of Pool's operations in Oman. As area manager in Oman, Ivan Andrick was responsible for organizing the scaling down operations. Ivan Andrick's supervisor was Hale. Russell Alexander ("Alexander") was placed into the position of resident superintendent by Ivan Andrick to complete the cessation operations in Oman. At the time, Alexander was 37 years old.

Thereafter, Ivan Andrick was terminated from employment. Andrick argues that Hale assured him that he would be placed in a different position with the company in either Italy, Ecuador, Tunisia, Malaysia, or the United

States. Andrick further argues that the company had always placed him in another position after the completion of an operation and that he had no reason to expect otherwise in this instance.

Pool and Hale filed the instant motions arguing that all of the plaintiffs' causes of action should be dismissed as they cannot establish a genuine issue of material fact necessary to sustain the claims. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. of Civ. Proc. 56(c). Thus, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *See also State Farm Life Ins. Co. v. Guttermann*, 896 F.2d 116, 118 (5th Cir. 1990).

Defendants argue that Ivan and Helen Andrick's claim of age discrimination should be dismissed. Plaintiffs filed the age discrimination cause of action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq*. Pursuant to the ADEA, in order to establish a prima facie case of age discrimination, a plaintiff must establish: (1) that he/she was discharged; (2) that he/she was qualified for the position; (3) that he/she was within the protected class at the time of the discharge; (4) that he/she was replaced by someone outside the protected class, replaced by someone younger, or otherwise discharged because of age. *Bodenheimer v. PPG Indus. Inc.*, 5 F.3d 955, 957 (5th Cir. 1993). If the plaintiff meets these requirements, there is a presumption of discrimination which

the defendant must rebut by articulating a legitimate non-discriminatory reason for the discharge. *Id.* If the employer successfully rebuts the presumption of age discrimination, the employee's prima facie case dissolves. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981). The plaintiff then has the burden of establishing that the proffered reasons, as stated by the employer are not the real reasons for the discharge but are pretextual. However, not only must the plaintiff establish that the employer's stated reasons are pretextual, but are pretextual for *age discrimination.*

In the instant case, Ivan Andrick argues that the Court should consider not only the position in Oman, but the various positions in other countries in which Pool operated, (such as Malaysia, Ecuador, Italy, Alaska, and Tunisia) in determining whether he has established a prima facie case of age discrimination. The Court determines that Ivan Andrick has established a prima facie case for age discrimination pursuant to the aforementioned factors. However, Helen Andrick has failed to establish a prima facie case for age discrimination as she has not demonstrated that she was ever employed or discharged by the defendants. Thus, Helen Andrick's ADEA claims are properly dismissed.

Having established a prima facie case of age discrimination, Pool and Hale have provided legitimate, non-discriminatory reasons for their decision to terminate Ivan Andrick. First, as the operations in Oman were being terminated, Alexander was placed in a position to wind-down operations. Alexander was receiving approximately 35% less compensation than was Ivan Andrick and was placed in an inferior position. Thus, the decision to retain Alexander in Oman to oversee the cessation operations at a reduced salary than Andrick was receiving, is a legitimate, non-discriminatory reason.

Concerning the other positions in the various countries in which Andrick argues that he could have been placed, the defendants have provided legitimate, non-discriminatory reasons for these decisions based on the experience, abilities, success at building the company's reputation, and the relationship with the clients of the managers in those positions. In sum, the company simply did not have an available position for Andrick and this Court will not second guess the business decisions of the defendants. "The ADEA was not intended to be a vehicle for judicial second-guessing of employment decisions, nor was it intended to transform the courts into personnel managers." *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1504 (1988).

As the defendants have provided legitimate explanations for not placing Andrick in another position, he must prove that the proffered reasons stated are pretexts for age discrimination. At the summary judgment stage, the Court's inquiry is whether the plaintiff has tendered factual evidence that would lead a jury to reasonably conclude that the employer's reasons are a pretext for age discrimination. *St. Mary's Honor Society v. Hicks*, 113 S.Ct. 2742, 2747 (1993). Andrick has provided no factual evidence to establish that there is a fact question concerning pretext. Thus, Ivan Andrick's ADEA claims should also be dismissed.

The defendants argue that Ivan and Helen Andrick's claims for intentional infliction of emotional distress should also be dismissed. The plaintiffs' allege that the defendants' treatment of Ivan Andrick in terminating him after 30 years service and in failing to recognize his contribution to the company constitute a cause of action for intentional infliction of emotional distress. Specifically, plaintiffs' state that Andrick was not recognized for his 30 years of service to the

company, he was summarily fired without prior warning, notice or cause, he was exploited by Hale by having to select and train his "replacement" while being told that there was another position available for him, he was humiliated by his sudden termination, and further embarrassed when Hale invited him to a retirement party in his honor. Helen Andrick alleges that the defendants intentionally caused her emotional distress by depriving her husband of an income and a paycheck that she was accustomed to receiving, causing her embarrassment, having her husband around the house and causing her to do more housework as a result, and being limited in her social activities because her husband was at home all day. See Document #55 (deposition of Helen Andrick).[3] However, she also stated in her deposition that she had enough money to live comfortably on and was receiving retirement benefits from Pool. *Id.*

The elements of the cause of action for intentional infliction of emotional distress are: (1) the defendant acted intentionally or recklessly, (2) the conduct was extreme and outrageous, (3) the actions of the defendant caused the plaintiff emotional distress, and (4) the emotional distress suffered by the plaintiff was severe. *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993). The issue of whether the defendants' actions were outrageous is a question of law for the Court to determine. See *Wornick Co. v. Casas*, 856 S.W.2d 732, 733 (Tex. 1993). Outrageous conduct is that which "[goes] beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a

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[3] The amended complaint states "[a]dditionally, the defendants knew that Helen Andrick, the wife of Ivan Andrick, was dependent on the income of her husband. Instead of looking forward to retirement and enjoyment of their golden years, these people are faced with the grim and bleak uncertainty of starting a new career at age 64." See Document #65 at 2.

civilized community." *Id.* at 734 (citing the Restatement 2d of Torts, § 46).

As Texas is an at-will state, the act of terminating an employee is in and of itself a legal right of the employer and can not be, by itself, the basis for an allegation of outrageous behavior. *Id.* at 735. In the instant case, none of the actions of the defendants in terminating Andrick constitute outrageous conduct such that would "exceed all possible bounds of decency" and would be "utterly intolerable in civilized community." *Id.* (citations omitted). Defendants acted within their legal rights in terminating Andrick and making the decision not to place him in another position. The resulting consequences of his termination, i.e. feelings of embarrassment, humiliation, and not having a paycheck are all unfortunate effects of a termination and do not in and of themselves constitute outrageous conduct. Furthermore, the company's failure to recognize Andrick's 30 years of service to the company and giving him a retirement party do not, as a matter of law, constitute outrageous conduct. Helen Andrick's allegations that the company caused her humiliation, embarrassment, additional housework, and limited her social activities does not constitute, as a matter of law, "outrageous conduct." Thus, the Court determines that the Andricks' cause of action for intentional infliction of emotional distress should be dismissed.

The defendants also argue that summary judgment is appropriate on plaintiffs' fraud and conspiracy to defraud claims. Ivan Andrick alleges that the defendants fraudulently induced him to select and train Alexander to replace him by falsely informing him that he would be placed in another position and subsequently terminating him. The elements of a cause of action for fraud are: (1) a material representation was made; (2) that it was false or made recklessly without any knowledge of its truth and as a positive assertion; (4) that it was made with the intention that it should be acted

upon by the party; (5) that the party acted in reliance upon it; and (6) the party thereby suffered injury. *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1993).

In the instant case, Pool lost the contract with PDO necessitating the need for the company to cease operating in Oman. Andrick acknowledges that it was necessary to close the company down. See Document #40, exhibit D (deposition of Ivan Andrick). Andrick also acknowledges that Russell, who was selected and trained by Andrick to oversee the operations in Oman, did not have the same responsibilities that Andrick had, had as area manager in Oman. *Id.* Andrick also acknowledges that as part of his recommendation for closing down operations in Oman that his position be eliminated. *Id.* Finally, Andrick concedes that no one specifically told him that he would be transferred to another position if the area manager position in Oman was eliminated. *Id.* Thus, as a matter of law, Andrick has admitted that there was no material misrepresentation upon which he relied. In selecting and training Alexander to take over the remaining operations in Oman, Andrick was simply doing his job and carrying out what was the best business practice for his employer. The company attempted to place Andrick in another position but at that time, there was nothing available. When an opportunity did become available in September 1994, Hale offered and Andrick accepted the job in Tunisia. Thus, as there was no material misrepresentation made, the plaintiffs' fraud claims should be dismissed.

The elements of a cause of action for conspiracy to defraud include: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more fraudulent, overt acts, and (5) damages as the proximate result. *Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1, 5 (Tex. App.--Corpus Christi 1991, no writ). The Court has already determined as a matter of law,

that there is no sustainable cause of action for fraud. Therefore, there cannot be a cause of action for conspiracy to defraud. Furthermore, as a matter of law, a corporation or other company cannot conspire with itself, no matter how many of its agents participate in the activity. *Nelson Radio and Supply Co., Inc. v. Motorola*, 200 F.2d 911, 914 (5th Cir. 1952). Thus, the cause of action for conspiracy to defraud should also be dismissed.

Plaintiffs' claim of unlawful termination with the intention of denying ERISA benefits should also be dismissed. 29 U.S.C. § 1140 states *inter alia*:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . .

Ivan Andrick argues that after he was terminated, had the company placed him in a position in the United States, he would have become eligible to receive ERISA benefits to which employees in foreign countries were not entitled. Thus, Andrick is alleging that although he would have accepted a position in any of the various foreign countries where Pool had opportunities and where he would not have been eligible for ERISA benefits, that because one of the places he could have been placed was in the United States, where he would have been eligible for ERISA benefits, that he was terminated to prevent him from obtaining these benefits.

In *Hines v. Massachusetts Mutual Life Ins. Co.*, 43 F.3d 207 (5th Cir. 1995) the Court affirmed the district court's order granting summary judgment in favor of the defendant where the plaintiff challenged the denial of ERISA benefits pursuant to § 1140. The Court stated that "an essential element of a Section 510 claim is proof of defendant's specific discriminatory intent." *Hines*, 43 F.3d at 209. Specific intent is a state of mind as such need not be proved as a fact, but may be inferred from the circumstances of the transaction and actions of the Defendant. *Cupit v. Whitley*, 28 F.3d 532 (5th Cir. 1994). Andrick has failed to provide any summary judgment evidence to support his claim of termination to prevent him from obtaining ERISA benefits, and as such, he had clearly failed to meet his summary judgment burden of establishing a genuine issue of material fact concerning the issue of specific discriminatory intent. In fact, in Andrick's deposition testimony, he admits that he was not terminated to prevent him from obtaining ERISA benefits. See Document #40, exhibit D at 116-17 (Ivan Andrick's deposition).

Helen Andrick's claim for wrongful termination of ERISA benefits should also be dismissed as she was neither a participant nor a beneficiary in any ERISA plan. Helen Andrick argues that she has a community property interest in her husband's recovery. However, as Ivan Andrick has failed to establish a genuine issue of material fact on the wrongful denial of ERISA benefits, Helen Andrick has no such claim.

Finally, plaintiffs have alleged in the amended complaint a cause of action for wrongful termination at common law. The Andricks allege that after Ivan Andrick assumed his duties in Tunisia, he became aware of a long-standing scheme by Pool to defraud the government of Tunisia of its' employees' income taxes. Andrick alleges

that he protested this practice but the scheme continued and as a consequence, he involuntarily resigned and returned to the United States. Defendants have moved to have this claim dismissed as a matter of law arguing that because Ivan Andrick was not terminated but rather that he voluntarily resigned, he cannot state a claim for wrongful termination.

The Texas Supreme Court in 1985 recognized an exception to the at-will employment doctrine: wrongful termination for refusal to commit an illegal act. *Sabine Pilot Serv. Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1993). However, as Andrick was not terminated from the position in Tunisia but resigned from that position, he cannot as a matter of law pursue a cause of action for wrongful termination. Thus, this cause of action should be dismissed. Based on the foregoing, the Court hereby

ORDERS the following:

(1) the motion for leave to file motion for summary judgment in excess of the page limits (Document #39) is GRANTED;

(2) the motion for summary judgment (Document #40) is GRANTED; and

(3) the motion for judgment on the pleadings (Document #69) is GRANTED.

SIGNED at Houston, Texas, on this 31 day of May, 1995.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE

APPENDIX B

U.S. COURT OF APPEALS
FILED
JAN 18 1996
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20450
Summary Calendar

IVAN ANDRICK; HELEN ANDRICK,
Plaintiffs-Appellants,

versus

POOL ENERGY SERVICES, CO.; R. G. HALE,
Defendants-Appellees,

and

LOUIS E. DUPREE,
Defendant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-94-CV-893

Before WIENER, PARKER and DENNIS, Circuit Judges.

PER CURIAM:*

Appellants Ivan and Helen Andrick appeal from the district court's order denying their lawsuit under the Age Discrimination in Employment Act, 29 U.S.C. § 621, and various state theories, including fraud, intentional infliction of emotional distress, and constructive discharge. They argue that the district court erred in evaluating their claims and in applying federal and state law. We have reviewed the record and the magistrate judge's report and recommendation and find no reversible error. Accordingly, we affirm for essentially the reasons given in the district court's order granting the defendant's motions for summary judgment and for judgment on the pleadings. *Andrick v. Pool Energy Services, Co., et al.*, No. H-94-983 (S.D. Tex. June 1, 1995).

Appellants' motion to file a reply brief out-of-time is DENIED and appellees' motion to strike the proposed reply brief is GRANTED.

AFFIRMED.

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*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20450

IVAN ANDRICK; HELEN ANDRICK,
Plaintiffs-Appellants,

versus

POOL ENERGY SERVICES, CO.; R. G. HALE,
Defendants-Appellees,

and

LOUIS E. DUPREE,
Defendant.

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

(February 22, 1996)

Before WIENER, PARKER and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

_____

ROBERT M. PARKER
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF
THE MANDATE